81-2388

Office - Supreme Court, U.S.
FILED
JUN 29 1982
ALEXANDER L. STEVAS,
CLERK

No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

JAMES M. CANINO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a defendant seeking a new trial under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and *United States* v. *Agurs*, 427 U.S. 97 (1976), on the ground that the prosecution has withheld exculpatory evidence, must show that he exercised due diligence prior to trial to obtain the omitted evidence. The United States Court of Appeals for the Third Circuit in this case, and the Courts of Appeals for the Seventh and Ninth Circuits in other cases, have held that due diligence is required, putting them squarely in conflict with the holding of the United States Court of Appeals for the District of Columbia Circuit and the reasoning of *United States* v. *Agurs*.

2. Whether the District Court and the Court of Appeals correctly applied *Brady* v. *Maryland*, *supra*, and *United States* v. *Agurs*, *supra*, when they held that exculpatory evidence in the possession of the prosecution before trial need not be given a defendant so long as, in the District Court's view, it would have been tactically unwise for the defendant to have used the evidence at trial.

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Petitioner James M. Canino prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Third Circuit which affirmed the judgment of conviction of petitioner James M. Canino entered upon a jury verdict of guilty and which, in a separate appeal, affirmed the judgment of the United States District Court for the District of New Jersey denying a new trial.

OPINIONS BELOW

The Court of Appeals issued no opinions. The oral opinion denying a new trial delivered from the bench by the United States District Court for the District of New Jersey is reprinted in the Appendix to this Petition. A. 5a.

JURISDICTION

The United States Court of Appeals for the Third Circuit entered judgment April 14, 1982, in two consoli-

dated appeals, affirming petitioner James M. Canino's conviction for conspiracy and substantive offenses, *United States* v. *Canino*, No. 81-2718, and affirming the judgment denying his motion for a new trial, *United States* v. *Canino*, No. 82-5142. Copies of these orders affirming the judgments of the United States District Court for the District of New Jersey are printed in the Appendix to this Petition. A. 2a; 3a. A timely petition for rehearing in the consolidated appeals was denied May 24, 1982. A copy of the Order of the United States Court of Appeals for the Third Circuit denying the petition for rehearing is also printed in the Appendix to this Petition. A. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in relevant part as follows:

> "No person shall be . . . deprived of life [or] liberty . . . without due process of law."

STATEMENT OF THE CASE

A. Proceedings Below

Petitioner James M. Canino was indicted October 31, 1980,[1] by a federal grand jury in Newark, New Jersey. The indictment charged Canino with one count of conspiracy, 18 U.S.C. § 371, eleven counts of mail fraud, 18 U.S.C. § 1341, seven counts of wire fraud, 18 U.S.C. § 1343, and two counts under the racketeering acts, 18 U.S.C. §§ 1962, 1963. The indictment alleged that Canino and his business associate, Alvin Raphael,[2] obtained kickbacks in connection with construction and operation of a

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[1] This indictment superseded an original indictment handed up March 19, 1980.

[2] Raphael, charged in each count along with Canino, died before trial.

housing project financed by the New Jersey Housing Finance Authority (hereinafter "N.J.H.F.A."), an agency of the State of New Jersey. Specifically, the indictment charged that Canino and Raphael required subcontractors who wished to obtain work on the housing project to inflate their contract prices and then to pay the inflated increment as a consulting fee to a company known as Regional Funding and Development Corporation (hereinafter "Regional Funding"), which in turn was owned by Canino and Raphael.

The case was tried to a jury in the United States District Court for the District of New Jersey in April 1981, the Honorable H. Curtis Meanor, J., presiding. At trial, the prosecution attempted to show that Canino had concealed the existence of Regional Funding from N.J.H.F.A. officials in the fear that any investigation of Regional Funding by state auditors would reveal the alleged kickbacks. The District Court refused to allow this evidence in to show that the concealment *per se* was fraudulent, but allowed the evidence in to show consciousness of guilt on the part of Canino. The prosecutors emphasized the point, and the District Court charged the jury that it could consider evidence of concealment as evidence of Canino's intent to defraud. A. 6a-9a.

During trial, the District Court dismissed one count against Canino and entered a verdict of acquittal on another. The jury acquitted Canino of two additional counts. It convicted him on the other charges. Notice of appeal was timely filed July 27, 1981.

After petitioner filed his initial brief in the United States Court of Appeals for the Third Circuit, he learned that the prosecutors, who at trial argued strenuously that he had concealed Regional Funding from state auditors, had in their possession worksheets of an auditor for N.J.H.F.A. which showed that, during a 1976 audit of the housing project at issue, the auditor had uncovered transactions between Regional Funding and A.J.

Tenwood Associates, Inc., indicating that the two companies were related. Moreover, the auditor's worksheets indicated that the auditor had treated Regional Funding as a company related to A.J. Tenwood and to Canino.

On the basis of this new evidence, petitioner on January 13, 1982, moved for a new trial on the ground that the information should have been disclosed pursuant to *Brady* v. *Maryland*, 373 U.S. 83 (1963), and *United States* v. *Agurs*, 427 U.S. 97 (1976). The District Court denied this motion, finding that (1) the evidence was not "newly discovered" because Canino did not exercise due diligence to discover it before trial, and (2) the evidence was not "material" because even had the petitioner been aware of the evidence, it would have been tactically unwise for him to have used it. A. 9a-12a.

Petitioner then filed timely notice of appeal from the District Court's denial of his motion. The two appeals were consolidated for argument and disposition in the United States Court of Appeals for the Third Circuit. The Court of Appeals affirmed both judgments without opinion April 14, 1982. A. 2a; 3a. On May 24, 1982, the Court of Appeals denied petitioner's petition for rehearing, filed in both appeals. A. 1a.

B. Statement of Facts

This case revolves around the financing and construction of a high-rise apartment project in West New York, New Jersey, known as Parkview Towers. For purposes of this project, Excel Corporation—owned by Canino and Raphael—in 1972 became a general partner in a newly-formed entity, Parkview Towers Company. (The limited partners were private investors.) Then in 1974 Parkview Towers Co. entered into an agreement with N.J.H.F.A. for the purpose of financing and constructing Parkview Towers, under which N.J.H.F.A. provided 90% of the agreed construction cost of approximately $20,000,000.00, and Parkview Towers Co. 10%, and under

which Parkview Towers Co. undertook to construct and manage the project.

With the approval of N.J.H.F.A., Parkview Towers Co. in April 1974 entered into a cost-plus-fee construction contract with a company known as A.J. Tenwood Associates ("Tenwood"). Tenwood was also a subsidiary of Excel. Tenwood was to act as general contractor, with responsibilities for hiring all subcontractors and managing construction of the project.

During this time, Canino had been seeking subcontractors who could bring the job in under the $20,000,000.00 mortgage ceiling. In looking for cost-efficient subcontractors, Canino became convinced of the need to form an entity that could provide start-up and bridge loans to subcontractors that otherwise, without such financing assistance, would not be able to do the work within the overall mortgage ceiling. After consulting counsel in both New York and New Jersey, both of whom stated it would be permissible to form a company to provide such financing assistance and to operate it as a sub-subcontractor on the project, he and Raphael formed Regional Funding in March 1974.

In 1979, a grand jury began investigating charges that Canino and Raphael used Regional Funding to obtain kickbacks from subcontractors working on Parkview Towers. In 1980, Canino and Raphael were indicted on 21 counts. Insofar as Regional Funding was concerned, the indictment focused principally on allegations that Canino and Raphael induced subcontractors as a condition of obtaining business to inflate their bids, and then required them to sign sham consulting contracts with Regional Funding by which the inflated amount would be paid Regional Funding. The indictment charged that

the subcontractors received no consulting services or financing assistance in return.[3]

Prior to trial, Canino made a general request of the prosecutors for exculpatory information as defined by *Brady* v. *Maryland*, 373 U.S. 83 (1963). A. 10a. The prosecution made no specific response to this request. The prosecution did, however, make available some 60,000 documents that the prosecutors had marked as exhibits for use at trial. A. 16a. Canino's access to this mass of undifferentiated documents was restricted before trial, and none of the documents specifically was designated as "*Brady* material." A. 15a-17a.

At the trial, the prosecution rested its case as to intent to defraud on proof that Canino had made strenuous efforts to conceal the existence of Regional Funding from N.J.H.F.A. In his opening argument, the prosecutor argued that intent to defraud would be proved by the fact Canino concealed Regional Funding from the State agency. The prosecution then attempted to support this contention by the testimony of several witnesses. Howard Kalb, Canino's accountant, testified that Canino had told him not to reveal the existence of Regional Funding as a party related to Excel and Tenwood. Another accountant said he had never learned of the fees paid by subcontractors to Regional Funding, even though he had told Canino that accepted accounting standards required disclosure in the audit of such related companies. In addition, the prosecutors put on the testimony of an employee of N.J.H.F.A. who said that Regional Funding's existence had not been disclosed on cost certifications submitted to N.J.H.F.A. by the general contractor, Parkview Towers Company.

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[3] The indictment also alleged that Canino took kickbacks on insurance contracts related to the project, and had Tenwood and subcontractors perform work on his home that was paid for by funds from the project.

The prosecutors originally sought to prove that Canino's failure to disclose the existence of Regional Funding was fraudulent in and of itself. The District Court rejected this approach, but did allow the prosecutors to put the foregoing evidence in to show intent to defraud. Accordingly, in closing argument the prosecutor hammered away at this concealment as the nail that held his fraud case together. Four times in his closing argument to the jury the prosecutor argued that the intent to defraud necessary to convict was proved by Canino's failure to disclose Regional Funding's existence to N.J.H.F.A. For example, the prosecutor argued that:

> "Anyone who looks at Regional Funding sees that it's a sham, and that's why they had to hide it. That's why they couldn't let the H.F.A. find out, because if you look at Regional Funding you see it's a sham, it's a kickback arrangement that won't stand the light of day." Trial Transcript, Vol. 16, at 2913.

And he again argued:

> "The point about him not disclosing Regional Funding to the H.F.A. is it shows that they knew they were dealing with kickbacks. They knew they were dealing with something improper because if you have got nothing to hide, why not disclose it." *Id.*, at 2914.

Most important, the District Court specifically instructed the jury that it could find intent from the evidence that Canino had concealed Regional Funding from N.J.H.F.A.:

> "You may, you're not required to, but you may consider the evidence of the concealment of Regional Funding as being relevant to defendant's intent to defraud." Trial Transcript, Jury Charge, at 49-50.
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> "The failure to disclose Regional Funding's existence itself is not a fraud, although you may consider such failure to disclose as evidence of defendant's probable objectives, intent or state of mind." *Id.*, at 51.

Upon the theory that intent under the mail and wire fraud statutes was made out by proof of concealment, then, the case went to the jury. Canino was convicted by the jury of mail and wire fraud, 18 U.S.C. §§ 1341, 1343, racketeering, 18 U.S.C. § 1962, the predicate crimes for which were the mail and wire fraud counts, and conspiracy to commit mail and wire fraud, 18 U.S.C. § 371.

Canino filed timely notice of appeal and urged reversal in the United States Court of Appeals on the ground, among others, that the evidence as to concealment of Regional Funding improperly was admitted.

After Canino submitted his brief on appeal, but before argument and submission, counsel representing Canino in civil ligitation against the United States discovered documents in the possession of the United States Attorney which showed that N.J.H.F.A. had in fact been aware as early as 1976 that Regional Funding existed and that it was related to Parkview Towers Co., Excel, and to Raphael and Canino. Specifically, Canino found worksheets prepared by an auditor employed by N.J.H.F.A. when the auditor did a preliminary review of the construction costs of the Parkview Towers project. As part of that review, the auditor, John Hutcheson, examined the books of Tenwood, where he found transactions recorded between Tenwood and Excel, Canino, and Raphael. He also found a transaction involving an interest-free loan from Tenwood to Regional Funding. After examining these transactions, Hutcheson prepared worksheets that treated Tenwood as related to Excel, Parkview Towers Co., Canino, Raphael, *and Regional Funding*. A. 8a-9a; 13a-25a.

At the same time, Canino discovered that the worksheets had been in the possession of the prosecution prior to trial. Indeed, Canino learned that the documents were

among the documents listed as exhibits by the prosecution prior to Canino's trial.[4]

Canino then moved in the District Court for a new trial on the ground the newly discovered worksheets should have been made available to him before trial under *Brady* v. *Maryland*. The District Court rejected Canino's *Brady* motion on two grounds. First, the court held the worksheets were not newly discovered in that "the failure to bring [them] forth" before trial "was due to a lack of diligence on the part of the defense in the preparation of this case." A. 9a. And second, the District Court held that the worksheets were not material to the defense because, had they been put in evidence, the jury would have interpreted them as a motive for concealment of Regional Funding from N.J.H.F.A. The District Court reasoned that had Canino known the worksheets were in N.J.H.F.A.'s possession, he would have had all the more reason to conceal the presence of Regional Funding from N.J.H.F.A. because any mention of Regional Funding would have, in the District Court's view, caused N.J.H.F.A. to check those previous worksheets. The Court said:

> "Even if it had been brought forth by the defense to support the thesis that we didn't try to hide Regional Funding from the N.J.H.F.A., it seems to me it would have been neutralized, if not entirely overcome to the detriment of the defense by the argument that I have just made, i.e., since the defense had an idea that the N.J.H.F.A. knew about Regional Funding and A.J. Tenwood and their relationship, that was all the more reason why . . . Canino and Raphael took great pains to prevent the

[4] As noted, these documents ran to tens of thousands of pages. They were made available to Canino in an undifferentiated mass. The prosecutors never identified any of the documents as exculpatory within the meaning of *Brady* v. *Maryland*. Canino and his lawyer had been given only restricted access to these documents before trial. A. 15a-17a.

N.J.H.F.A. from finding out about Regional Funding and its presence on this job.

"This evidence either would have had no effect whatsoever on this trial had it been adduced, or, as I think is most likely, would have had a decided detrimental effect on the defendant in this case." A. 12a.

Canino timely filed notice of appeal, and this second appeal was consolidated with the direct appeal. The Court of Appeals affirmed both judgments April 14, 1982. It denied Canino's consolidated petition for rehearing in both cases May 24, 1982.[5]

REASONS WHY THE WRIT SHOULD BE GRANTED

In affirming the judgments of the District Court, the Court of Appeals erred in requiring that Canino establish that he used due diligence to discover the evidence before trial. The reasoning of *United States* v. *Agurs*, 427 U.S. 97 (1976), and the square holding of *Marshall* v. *United States*, 436 F.2d 155 (CADC 1970), are that no such due diligence is required when a motion for a new trial is based on *Brady* v. *Maryland*, 373 U.S. 83 (1963). The judgment of the Third Circuit in this case thus presents a conflict with decisions of this Court and another Court of Appeals.

In addition, the decision of the Court of Appeals conflicts with the holding of this Court in *United States* v. *Agurs*, that a new trial must be granted whenever the prosecution fails to turn over information in its files that "creates a reasonable doubt that did not otherwise exist." *Id.*, at 112. Neither the District Court nor the Court of Appeals applied that standard here. To the contrary, they held that because the omitted evidence, in the District Court's view, would not have been used by the petitioner at trial as a matter of tactics, a new trial

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[5] This petition seeks a writ of certiorari to review the judgments in both appeals. Sup. Ct. Rule 19.4.

was not required. This is in conflict with this Court's decision in *Agurs*.

1. The Courts of Appeals Are In Conflict as to Whether Due Diligence Need Be Shown

There is no question here as to whether Canino was aware of the Hutcheson worksheets during trial. He was not. The District Court nevertheless held that those worksheets were not "newly discovered" evidence within the meaning of Fed. Rule Crim. Pro. 33, because the worksheets were among the many documents—running to tens of thousands of pages—made available to Canino by the prosecutors before trial. The District Court held:

> "[U]nder the circumstances this evidence is by no means newly discovered [because] the failure to bring it forth . . . was due to a lack of diligence on the part of the defense in the preparation of this case." A. 9a.

The ruling of the District Court—affirmed by the Court of Appeals—thus adopted in the context of a motion based upon *Brady* v. *Maryland* the traditional requirement under Fed. Rule Crim. Pro. 33 that "a new trial on the ground of newly discovered evidence will be denied if the defense did not show due diligence to learn of the evidence." 2 C. Wright, Federal Practice & Procedure § 557, at 520 (1969). See, *e.g.*, *Reno* v. *United States*, 340 F.2d 307 (CA 5 1965); *United States* v. *Capece*, 287 F.2d 537 (CA 2), *cert. denied*, 368 U.S. 847 (1961). In so ruling, the Third Circuit aligned itself with a number of other Courts of Appeals that have held that due diligence must be shown in a motion made under *Brady* and *Agurs*. See, *e.g.*, *United States* v. *Shelton*, 588 F.2d 1242, 1250 (CA 9 1978), *cert. denied*, 442 U.S. 909 (1979); *United States* v. *Hedgeman*, 564 F.2d 763, 768 (CA 7 1977), *cert. denied*, 434 U.S. 1070 (1978); *cf. United States* v. *Mackey*, 571 F.2d 376, 389 n.15 (CA 7 1978).

But in so ruling, the Third Circuit here—like the Seventh Circuit in *Hedgeman*, *supra*, and the Ninth Circuit in *Shelton*, *supra*—is in direct conflict with the decision of the United States Court of Appeals for the District of Columbia Circuit in *Marshall* v. *United States*, 436 F.2d 155 (CADC 1970). In that case, the trial court had held that the defendant was not entitled to a new trial on the basis of newly discovered evidence that a lineup had been conducted in violation of the defendant's Due Process rights, because the defendant had not demonstrated that he had made diligent efforts to secure that evidence at trial. The Court of Appeals rejected this due diligence demand. Because the defendant could have raised his challenge to the lineup collaterally after conviction, the Court held, "his counsel's lack of diligence at time of trial should be no barrier to considering a motion for a new trial on the merits of the constitutional issue raised." *Id.*, at 159. The Court of Appeals concluded:

> "Thus we are of the view that the 'due diligence' standard which ordinarily governs disposition of motions for a new trial based on alleged newly discovered evidence should not apply when the new evidence raises issues which challenge the constitutional validity of the conviction." *Id.*, at 159 n.11 (citation omitted).

Under *Marshall*, due diligence as used in Rule 33 cases would not be a consideration in evaluating a claim under *Brady* and *Agurs*, for a *Brady* claim is one that "challenge[s] the constitutional validity of the conviction," *Marshall*, *supra*, 436 F.2d, at 159 n.11, by alleging that the failure to provide the *Brady* evidence deprived the defendant of due process of law under the Fifth Amendment. Because Canino's motion for a new trial thus raised a constitutional challenge to his conviction, under *Marshall* Canino would not have been required to establish "due diligence" to make out his claim for a new trial. The decision of the District Court and the Third

Circuit, however, imposed on Canino just such a due diligence obligation.

Indeed, the requirement of due diligence in this case is not only in direct conflict with the decision of the D.C. Circuit in *Marshall*, it is inconsistent with the reasoning of this Court's decision in *Agurs*. Prior to *Agurs*, defendants seeking a new trial under *Brady* generally were required to establish "five essential requisites for [obtaining] a new trial on the basis of 'newly discovered' evidence." *United States* v. *Meyers*, 484 F.2d 113, 116 (CA 3 1973), *cited in Agurs*, *supra*, 427 U.S., at 111 n.19. Specifically, the defendant had to prove that the evidence (1) came to his knowledge after trial; (2) could not have been discovered sooner had he exercised due diligence; (3) is not cumulative or impeaching; (4) is material to the issues involved; and (5) would probably lead to acquittal in a new trial. See, *e.g.*, *United States* v. *Myers*, *supra*, 484 F.2d, at 116; 2 C. Wright, Federal Practice & Procedure § 557 (1969).

In non-*Brady* situations, these requirements "to establish that a new trial is warranted on the basis of new evidence under Rule 33" remain the law today. *United States* v. *Hedman*, 655 F.2d 813, 814 (CA 7 1981). See, *e.g.*, 2 C. Wright, Federal Practice & Procedure § 557 (1969). Where the motion is made under *Brady*, however, not all these five requirements apply. *Agurs* held that "the defendant should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal." *Agurs*, *supra*, 427 U.S., at 111. *Agurs* thus changed the traditional test for determining when a new trial is to be granted by allowing a new trial if the evidence "creates a reasonable doubt that did not otherwise exist." *Id.*, at 112. The Court departed from the traditional test precisely because of the special Due Process concerns raised by a *Brady* motion for a new trial that are not present in other new trial situations, thus echoing

the concern in *Marshall* that the presentation of constitutional claims not be restricted on motions for a new trial by a rigid adherence to previous standards under Rule 33.

In the same way, the special constitutional concerns of *Agurs* require that due diligence need not be shown when a new trial is sought under *Brady*. Where material, exculpatory evidence in the possession of the prosecutor is not revealed, a new trial should be granted whether or not the defendant by due diligence could have discovered the evidence before trial. As this Court held in *Agurs*, "if the standard applied to the usual motion for a new trial based on newly discovered evidence were the same when the evidence was in the State's possession as when it was found in a neutral source, there would be no special significance to the prosecutor's obligation to serve the cause of justice." *Id.*, at 111. See, *e.g.*, *United States* v. *Shelton*, *supra*, 588 F.2d, at 1250 & n.14.

The decisions in this case, however, and of the Ninth Circuit in *Shelton* and the Seventh Circuit in *Hedgeman*, all reject the *Marshall* position and the reasoning of *Agurs*, and retain the traditional Rule 33 due diligence requirement in the context of a *Brady* motion. This Court should issue a writ of certiorari to resolve this conflict.

2. The Omitted Evidence Creates A Reasonable Doubt

In this case, the prosecutors possessed—but failed specifically to disclose to Canino—information that N.J.H.F.A. was in fact aware of the existence of Regional Funding, and of Regional Funding's relationship to Canino and Canino's other companies. In the circumstances of this case, this evidence would have created a reasonable doubt had it been presented to the jury. The Fifth Amendment accordingly requires a new trial.

Canino made only a general request for exculpatory information as defined by *Brady* v. *Maryland*, *supra*.

The failure of the prosecutor to provide the Hutcheson worksheets in response to this request therefore amounts to a violation of Canino's Fifth Amendment rights under the Due Process Clause if that evidence would have "create[d] a reasonable doubt that did not otherwise exist." *United States* v. *Agurs*, 427 U.S., at 112. This formulation of the test under the Due Process Clause has uniformly been followed by the federal courts applying *Agurs*. *See, e.g., United States* v. *Gardner*, 611 F.2d 770, 774 (CA 9 1980); *Ruiz* v. *Cady*, 635 F.2d 584, 586-587 (CA 7 1980); *United States* v. *Delk*, 586 F.2d 513, 518 (CA 5 1978).

Analysis of the Hutcheson worksheets in light of the whole record in this case demonstrates that the *Agurs* test is met here. The prosecutors' theory was that Canino used Regional Funding as a vessel through which to obtain kickbacks from subcontractors. They rested their case as to intent to defraud upon evidence that Canino attempted to conceal the existence of Regional Funding from N.J.H.F.A. The prosecutors called the accountants and through them put in extensive evidence that Canino took pains to conceal Regional Funding. They then called an employee of N.J.H.F.A. who testified that Regional Funding was not listed in papers filed with that agency as related to Canino or any of Canino's companies. In closing argument, the prosecutors repeatedly emphasized that this concealment was proof of intent. And they obtained from the District Court instructions to the jury that intent to use Regional Funding to defraud N.J.H.F.A. could be inferred from evidence of concealment.

In these circumstances, introduction into evidence of the Hutcheson worksheets would have created a reasonable doubt. Those worksheets show that as early as the spring of 1976 an N.J.H.F.A. auditor was aware of Regional Funding. They show that the auditor was aware of the relationship between Tenwood—a Canino

company—and Regional Funding, as evidenced by the $30,000.00 interest-free loan from Tenwood to Regional Funding discovered by the auditor. And they show an awareness that the auditor—and thus, N.J.H.F.A.—realized that Canino, Raphael, Excel, Tenwood, and Parkview Towers Company were all related to Regional Funding.

The Hutcheson worksheets thus negated the principal evidence of intent relied upon by the prosecutors below, that is, the supposed concealment of Regional Funding from N.J.H.F.A. These worksheets showed that far from being hidden, Regional Funding was known to N.J.H.F.A. They show that Canino, by opening Tenwood's books to Hutcheson, himself provided access to information revealing the existence of Regional Funding, and to information showing Regional Funding to be related to Canino, Raphael, and the companies they controlled.

On this record, then, the test of *Agurs* was met: the Hutcheson worksheets create a reasonable doubt as to guilt, by negating the intent drawn from evidence of concealment, that was not otherwise in the evidence.[8] Had the District Court or the Court of Appeals applied the proper test, then, it would have reversed the conviction and granted Canino a new trial.

But the courts below did not follow *Agurs*. They did not analyze the newly discovered evidence in light of the record to determine whether a reasonable doubt was

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[8] This is especially true in light of *Agurs*' modification of the test for determining when a new trial is to be granted under Rule 33. As discussed above, before *Agurs* motions for a new trial under Fed. Rule Crim. Pro. 33, even when based on *Brady*, had to show that the newly discovered evidence probably would have resulted in acquittal. After *Agurs*, however, the test is "not so severe as to require the defendant who discovers the undisclosed evidence after trial to demonstrate that it 'probably would have resulted in acquittal.'" *United States* v. *Imbruglia*, 617 F.2d 1, 5 n.9 (CA 1 1980), *quoting United States* v. *Agurs*, *supra*, 427 U.S., at 111. It is enough that the evidence creates a reasonable doubt.

created. To the contrary, they analyzed the Hutcheson workpapers from a tactical standpoint only. The trial court speculated that, had Canino known of the existence of the worksheets, he would have worked all the harder to conceal Regional Funding from N.J.H.F.A. The Court theorized that Canino at trial therefore would have avoided introducing the Hutcheson worksheets—even had he possessed them—because those worksheets would have given him but one more motive to have concealed Regional Funding from N.J.H.F.A. As the District Court stated: "Frankly, as a defense counsel in this case, had I known of it, I would have stayed away from it like I would have stayed away from a rattlesnake or a cobra." A. 11a.

This is a perversion of the *Agurs* test. The Fifth Amendment to the Constitution, as interpreted by *Agurs*, requires that a new trial be ordered when the evidence withheld creates a reasonable doubt as to guilt. Nothing in *Agurs*, nothing in *Brady*, nothing in the Fifth Amendment, remotely indicates that the grant of a new trial turns upon the trial court's opinion as to whether a wise defense lawyer would have used the evidence or not. *See, e.g., United States* v. *Provenzano*, 615 F.2d 37, 50-51 (CA 2), *cert. denied*, 446 U.S. 953 (1980).

The judgments of the Court of Appeals affirming the District Court thus departed substantially from the test set forth in *Agurs*. This Court should issue a writ of certiorari to correct that misinterpretation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

IRVING YOUNGER
Counsel of Record
WILLIAM ALDEN MCDANIEL, JR.
WILLIAMS & CONNOLLY
Hill Building
Washington, D.C. 20006
(202) 331-5000

SEYMOUR MARGULIES
JACK JAY WIND
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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2718
No. 81-5142

UNITED STATES OF AMERICA

v.

JAMES M. CANINO,

Appellant

(Criminal No. 80-0082-01—D.N.J.—Newark)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, *Circuit Judges*, STAPLETON, *District Judge.**

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Seitz
Chief Judge

Dated: May 24, 1982

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* Walter K. Stapleton, Judge of the United States District Court for the District of Delaware, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-5142

UNITED STATES OF AMERICA

v.

JAMES M. CANINO,

Appellant

(Criminal No. 80-0082-01 D.N.J.—Newark)

Submitted Under Third Circuit Rule 12(6)
April 13, 1982

Before: SEITZ, *Chief Judge*, ADAMS, *Circuit Judge*, and STAPLETON *District Judge.**

JUDGMENT ORDER

After consideration of the contentions raised by appellant, to-wit, that (1) exculpatory evidence was unconstitutionally withheld from defendant, (2) the "spill-over" effect requires a new trial on all issues, and (3) under the facts at bar, the reference to regional funding in the H.F.A. audit papers is newly discovered, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By the Court,

/s/ Seitz
Chief Judge

ATTEST:

/s/ Sally Mrvos
SALLY MRVOS
Clerk

Dated: Apr. 14, 1982

* Walter K. Stapleton, Judge of the United States District Court for the District of Delaware, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2718

UNITED STATES OF AMERICA

v.

JAMES M. CANINO,

Appellant

(Criminal No. 80-0082-01—D.N.J.—Newark)

Submitted Under Third Circuit Rule 12(6)
April 13, 1982

Before: SEITZ, *Chief Judge*, ADAMS, *Circuit Judge*, and STAPLETON *District Judge.**

JUDGMENT ORDER

After consideration of the contentions raised by appellant, to-wit, that (1) the instruction which was given to the jury concerning the amount of persuasion or conviction which it must have of the truth of the charges in order to find defendant guilty was plain error. Therefore, the new trial motion should have been granted, (2) the jury charge on the element of specific intent as it pertains to ignorance of the law was improper, (3) the court's charge relating to regional funding contracts was prejudically erroneous because it failed to include the element of deception as a required element of the alleged crime, (4) the court erred in allowing into evidence

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* Walter K. Stapleton, Judge of the United States District Court for the District of Delaware, sitting by designation.

non-applicable accounting principles. The appearance of what erroneously purports to be an inculpatory standard was prejudicial to the defendant and the court erred in charging that the legal non-disclosure of regional funding could be used to prove intent to defraud, (5) the jury did not receive proper instructions relating to the elements of the crime of conspiracy, (6) the court erred in instructing the jury as to the exposure of the defendant for being liable as an aider and abettor, (7) failure to disqualify Donald M. Horowitz, Esquire, as attorney for defendant deprived defendant of effective counsel, (8) the statements of Raphael were improperly admitted without a proper threshold finding of a conspiracy, (9) the court's failure to instruct the jury of the nature and theory of the defense was prejudicial error, (10) failure of the court to charge a specific mens rea as an element of 18 U.S.C. 1962(C) is reversible error, and (11) prosecution of defendant, Canino, under the totality of the circumstances at bar, was a violation of his due process rights, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By the Court,

/s/ Seitz
Chief Judge

ATTEST:

/s/. Sally Mrvos
SALLY MRVOS
Clerk

Dated: Apr. 14, 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Criminal No. 80-82

UNITED STATES OF AMERICA,

vs.

JAMES M. CANINO,

Defendant.

TRANSCRIPT OF PROCEEDINGS

MOTION

Newark, New Jersey
February 26, 1982

Before:

THE HONORABLE H. CURTIS MEANOR, U.S.D.J.

Appearances:

W. HUNT DUMONT
UNITED STATES ATTORNEY
By: RALPH JACOBS
Assistant United States Attorney
For the Government

MARGULIES & MARGULIES, P.A.
By: SEYMOUR MARGULIES, ESQ.
Attorneys for the Defendant

THOMAS F. BRAZAITIS, C. S. R.
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT

P.O. Box 397
Newark, N.J. 07101

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[53] MR. CANINO: No.

MR. MARGULIES: No. We really are looking at the bull's eye when we are talking about Regional, sir. I mean, realistically that's the case. Not just technically. Thank you, sir.

THE COURT: Let me take a recess and I'll decide this thing in about five minutes.

(A brief recess is taken.)

THE COURT: Mr. Jacobs, there was some evidence about the N.J.H.F.A. having a policy against related party transactions in these projects. Who did that come from?

MR. JACOBS: I believe Kathleen O'Kenica—

THE COURT: The young lady that testified?

MR. JACOBS: I sought to examine her at some length about the prohibition. I think your Honor precluded that line of testimony.

There may have been a few questions along that line, sir.

THE COURT: All right, gentlemen, this is a motion by James M. Canino for a new trial.

Mr. Canino was convicted, to my recollection, about eleven months ago on, I think, seventeen counts of nineteen counts that went to the jury.

I'm a little handicapped in the precise [54] details because there is an appeal pending and the file of this court is now residing with the Third Circuit. The details I'm missing, however, are not in any way necessary to the resolution of the present motion.

I think the law with respect to my permitted ambit of activity is well settled. I cannot grant the new trial at this juncture. That would destroy the appeal and I cannot destroy the subject matter of an appeal pending before the Third Circuit.

I can deny the motion for a new trial, which will not have any effect on the pending appeal, except that an appeal probably will be taken from such denial and joined with the main appeal.

I can also indicate that if free to do so the motion for a new trial would be granted thus to permit Mr. Canino, through counsel, to request a remand from the Court of Appeals so that the motion for a new trial can be granted and a new trial take place.

I don't think anyone disputes that recitation of the applicable legal rules.

Mr. Canino was indicted here along with Mr. Raphael in various counts of mail fraud and under the RICO statute.

The case centered around a project in, I believe, West New York called Parkview Towers.

[55] Parkview Towers was to be erected largely with a loan procured from the N.J.H.F.A. There was, as I understand it, a limited partnership, and the general limited partners also had an investment in the construction of Parkview Towers.

Messrs. Canino and Raphael were essentially in control of Parkview Towers. I believe they were the general partners, or the principal general partners.

A.J. Tenwood was the general contractor for the Parkview Towers project. Also a Raphael-Canino company.

Fraud was alleged by the government in three particulars: The original indictment asserted fraud in that both Canino and Raphael had work done on their private homes which was charged to the Parkview Towers project. Second, it was alleged that through a concern called Regional Funding & Development, fraud was perpetrated.

Regional Funding & Development was also a company controlled by Raphael and Canino. The fraud, and the proofs showed, went like this: A subcontractor would bid, a subcontractor would be told that his bid would be raised or inflated by a certain amount of dollars. He would then sign a contract with Regional Funding in which he agreed to pay Regional Funding for his services in the exact amount or in virtually the exact amount of the assertion of his bid. That money would be paid by the [56] subcontractor to Regional Funding.

The third element of the fraud in this case concerned a very unlikeable character named George Protter. It was alleged that Mr. Protter, as an insurance broker, procured insurance on the project. He would inflate the premiums and kick back the amount of the inflation to Raphael and Canino.

The government sought initially to try to prove that concealment of the existence of Regional Funding & Development was in itself a crime. I did not allow that.

The major testimony concerning the concealment of Regional Funding & Development came into this case with the testimony of accountants named Kalb and Mintz. Kalb, to my recollection, was the original accountant. He, however, had an interest in the project, as I think a limited partner. And, in any event, his interest, whatever it was, disqualified him as an accountant to make reports to the N.J.H.F.A.

A Mr. Mintz was substituted. And according to the evidence of both Mintz and Kalb, efforts of a considerable nature were made to keep Mr. Mintz from finding out about Regional Funding and Regional Funding as a corporation controlled by Raphael and Canino.

This, of course, the government argued, was an effort to hide Regional Funding both as to its existence [57] and as to its presence as a sub-subcontractor from the N.J.H.F.A.

Now, Mr. Mintz also testified that he questioned the defendants about the existence of related parties or corporations and very carefully was not told about Regional Funding.

It has now come to light that in an audit which apparently took place in 1976 by a Mr. John Hutcheson of the N.J.H.F.A., it was revealed in an audit of the books of A.J. Tenwood that A.J. Tenwood had made an interest-free loan to Regional Funding which was made and paid in the same year. That information was in the files of the N.J.H.F.A. And it's clear to me that if anyone thought about the matter, or had reason to think about

it, knowledge of that transaction would lead to the conclusion that there was a high probability, or a great potentiality that there was a relationship between Tenwood and Regional Funding. Interest-free loans between corporations normally would not take place unless there was some common control ownership or some relationship between them.

These work papers of Hutcheson, in which the loan was noted, were marked as exhibits by the government, and were available for the inspection of defense counsel virtually from the beginning of this case.

The Hutcheson papers, however, were never [58] introduced into evidence. The case was somewhat delayed, the indictment originally was returned in March of 1980, I believe. We had a trial scheduled for May or June. Mr. Raphael became seriously ill. We had him examined, it was clear he could not go on, he was in the hospital.

The case was adjourned to September of 1980. At that time Mr. Canino was seriously ill. He was in the hospital and had quadruple bypass surgery.

The case, I think, was scheduled for January 1981, at which time Mr. Raphael died and we finally got underway in March.

A superseding indictment was returned in October of 1980 adding the George Protter insurance fraud count. So there was plenty of time for counsel to go over these papers and discover this Hutcheson evidence.

Also, I think it's fair to charge Mr. Canino with knowledge of the fact of the audit of the Tenwood books by Hutcheson. And with the fact, or the probability that the existence of the Tenwood-Regional Funding loan would have been revealed by that audit, as it was.

It seems very clear to me that under the circumstances this evidence is by no means newly discovered, and the failure to bring it forth, if in fact there was a failure to bring it forth, was due to a lack of diligence on the part of the defense in the preparation of this case.

[59] For those reasons I cannot treat this evidence as newly discovered.

The other tong or focus of the defense's argument is that the failure of the government to bring to the defendant's attention this allegedly exculpatory material was a violation of the government's obligation under the Brady and Agurs cases.

Brady v. Maryland reported at 373 U.S. 83, 1963, and United States v. Agurs, 427 U.S. 97, 1976. They are the basic Supreme Court cases concerned with the obligation of the government to reveal to the defendant any evidence in the government's possession which is exculpatory either as to guilt or punishment.

I think we can run by very briefly the government's obligations. The prosecutor is charged with the knowledge of material in his file whether he's read his file or not, or whether he knows that such material is in his file.

There was no demand for this material, or there was a general demand for Brady material. However, there was no specific demand for this particular material. But, nonetheless, if it falls within the ambit of Brady it seems to me that the government had an obligation to notify defense of it and bring it forth.

If it is Brady material, Brady evidence, it [60] has to be material to the defense case.

Now, let's analyze this a little bit.

There was an assiduous effort on the part of the government to prove that the existence of Regional Funding was hid from the N.J.H.F.A. And the Mintz and Kalb testimony brought that forth.

The existence of Regional Funding, per se, would do no harm. I mean, if the N.J.H.F.A. simply knew nothing more than that there was a concern called Regional Funding and Development that was acting as a subcontractor on this job, that without more does nothing harmful to the defense. It could have been owned by Joe Jones, or Timothy Smith for all one would know just knowing those bare facts.

What was harmful would be if the N.J.H.F.A. looked into the Regional Funding and found, as was easy to find, and as was not contested at trial, the fact that Regional Funding was controlled by Raphael and Canino and was related both to the owner, Parkview Towers, and the general contractor, A.J. Tenwood on this project. That I think itself would cause consternation, because one can readily realize the presence of various related parties working on a particular project would cause anyone paying for the project to suspect perhaps maybe something unethical or fraudulent is occurring.

[61] If the N.J.H.F.A. looked into it and looked into Regional Funding and what was actually going on as the proofs showed, i.e., that Regional Funding was being used as a conduit for fraud, there would have been a great deal of trouble as there later was when the federal indictment was returned.

The Hutcheson evidence, it seems to me, is in no way material to this case. As a matter of fact, it either has no effect on the case at all or it would have a detrimental effect on the case to the defense.

First, let's make the assumption that a defense counsel knows that the N.J.H.F.A. has buried in its files evidence of a 1976 or '75 interest-free loan from Tenwood to Regional Funding. That in itself provides a legitimate inference of a relationship between those two parties.

If the N.J.H.F.A. knows of that loan and infers that they are related companies, and also knows that Regional Funding is on the Parkview Towers project, then, of course the suspicions of N.J.H.F.A. are going to be aroused and it's going to look into it.

The fact that the N.J.H.F.A. knew or perhaps should have known, or had in its files information about Regional Funding and Tenwood, was all the more reason to keep the existence of Regional Funding and its presence on [62] this project away from the N.J.H.F.A.

Frankly, as a defense counsel in this case, had I known of it I would have stayed away from it like I would have stayed away from a rattlesnake or a cobra.

It could only bouce back and hurt me, not help me.

The evidence about the Hutcheson audit just simply has nothing to do with this case. To me the only logical thing that can be said about it is it provides all the more reason why the defense would want to keep knowledge of Regional Funding on this project as far away from the N.J.H.F.A. as possible.

Even if it had been brought forth by the defense to support the thesis that we didn't try to hide Regional Funding from the N.J.H.F.A., it seems to me it would have been neutralized, if not entirely overcome to the detriment of the defense by the argument that I have just made, i.e., since the defense had an idea that the N.J.H.F.A. knew about Regional Funding and A.J. Tenwood and their relationship, that was all the more reason why Kalb and Mintz, that the instructions of Canino and Raphael took great pains to prevent the N.J.H.F.A. from finding out about Regional Funding and its presence on this job.

This evidence either would have had no [63] effect whatsoever on this trial had it been adduced, or, as I think is most likely, would have had a decided detrimental effect on the defendant in this case.

For these reasons I will deny the motion for a new trial. Mr. Jacobs, will you present an order to me as promptly as possible?

MR. JACOBS: Yes, your Honor.

THE COURT: I presume that, Mr. Margulies, you will file an appeal from the denial and join it with the main appeal?

MR. MARGULES: Your Honor is correct.

MR. JACOBS: I have prepared an order.

THE COURT: I have signed the order. I'll instruct Mr. Towers to file it. We'll get you a conformed copy and you better file your appeal promptly.

MR. MARGULIES: Thank you, sir.

MR. JACOBS: Thank you, your Honor.

(Whereupon the matter stands adjourned.)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

HON. H. CURTIS MEANOR

Docket No. 80-82

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JAMES M. CANINO,
Defendant.

Criminal Action

MOTION FOR NEW TRIAL

[Filed Jan. 13, 1982]

TO: W. HUNT DUMONT, ESQ.
U.S. Attorney
970 Broad Street
Newark, New Jersey 07102

James M. Canino, by his undersigned attorneys, will appear before the Honorable H. Curtis Meanor, at the Federal Court Building, Newark, New Jersey, on February 22, 1982 and move the Court to enter an Order granting him a new trial herein on the record or afford an evidentiary hearing ancillary to this motion.

This motion is made on the grounds that there is newly discovered evidence of a material and an exculpatory nature which was in possession of the United States Attorney prior to and during the trial of this matter which the United States Attorney failed to disclose to the defendant in violation of the holding in *Brady v. Maryland*, 373 U.S. 83 (1963) and in violation of de-

fendant's right to due process. The evidence was not disclosed to the Court or jury; on the contrary the government argued and represented to the Court and jury facts repugnant to the facts known to the H.F.A. There was a manifest denial of justice. Relief is also predicated on either intentional concealment by the government or negligent non-disclosure of the material or such error on its part as to warrant a new trial.

Defendant will rely upon the files and records of this matter, and on the affidavits and brief submitted herewith.

MARGULIES & MARGULIES, P.A.
A Professional Corporation

By: /s/ Seymour Margulies
SEYMOUR MARGULIES
Attorneys for James M. Canino

Dated: January 13, 1982.

JJW/sr
Caninomo.script

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

HON. H. CURTIS MEANOR

Docket No. 80-82

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JAMES M. CANINO,
Defendant.

[Filed Jan. 13, 1982]

Criminal Action

AFFIDAVIT OF JAMES M. CANINO

STATE OF NEW JERSEY)
) ss
COUNTY OF HUDSON)

JAMES M. CANINO, being duly sworn according to law upon his oath deposes and says:

1. I am the defendant in this matter.

2. Prior to my indictment in this matter I had the opportunity to review certain documents pertaining to the civil matters with the State of New Jersey. Because there was a Federal investigation, the U.S. Attorney's office was present.

3. After the indictment I was allowed to review certain documents at the xerox office while they were being copied for use by the U.S. Attorney. This was so I could have copies made for myself of document I deemed necessary. I spent two full days reviewing and listing documents.

4. Between February 1, 1981 and March 10, 1981, I went to the office of the U.S. Attorney to review further documents on about five occasions. On these occasions I was required to particularize my document request and if the request was not made the day before my review I had to wait at least one hour for the document to be located and given to me. The reason given was that the documents were in possession of the F.B.I. and took up an entire room.

5. According to my best recollection and estimation, I reviewed over 60,000 documents. I have no recollection of having been shown exhibits in the 11000 or 12000 series. When the fact that the audit contained reference to Regional came to my attention after Mr. Margulies requested that my accountant make a specific search of 11501 so that he could explain 11501 to him, I was shocked. I had no consciousness or awareness prior to that revelation that any audit revealed the existence of Regional. The reason for my surprise was that the government had taken a position throughout that the matter had been concealed from them.

6. I knew that in fact I never concealed anything. I knew that all my books and records had been made available. In retrospect, I should not have been surprised to find an entry which was in the auditor's material and should have been there. Locating those sheets very realistically can be analogized to finding a needle in a haystack.

7. For trial preparation purposes I obtained copies of lists of pre-marked exhibits. The lists were extremely long. There were literally 60 pages on long size sheets just enumerating by some conclusory form the identity of the documents. The documents themselves were so voluminous that they filled many, many boxes and file-drawers. To attempt to go through each of them would be a Herculean and enormously time consuming undertaking. In fact, the matter was handled in a somewhat

disorganized fashion in that among other things, there were substituted exhibit page sheets issued from time to time on which added documents would appear. Although the document numbers were loosely cataloged, the related documents were not necessarily put in proximity to each other nor always given the same catelog number.

8. I tried to be very diligent in seeking to examine and obtain copies of all things that I thought might even remotely relate to me. It never occurred to me that the government was in possession of work sheets of the H.F.A. auditor that disclosed on their face the existence of Regional Funding.

/s/ James M. Canino
JAMES M. CANINO

Sworn to and subscribed before me
this —— day of January, 1982.

/s/ Susan Ranski
SUSAN RANSKI
Notary Public of New Jersey
My Commission Expires Dec. 9, 1982

JJW/sr
01/11/82
jamesaf.script

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

HON. H. CURTIS MEANOR

Docket No. 80-82

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JAMES M. CANINO,
Defendant.

[Filed Jan. 13, 1982]

Criminal Action

AFFIDAVIT

STATE OF NEW JERSEY)
) ss
COUNTY OF HUDSON)

HYMAN WOLBORSKY, being duly sworn according to law, upon his oath deposes and says:

1. I am a C.P.A. and am the assistant secretary and controller of Parkview Management Co.

2. I have reviewed the work papers of J. Hutcheson, the auditor employed by the New Jersey Housing Finance Authority who audited the Parkview Towers project on behalf of the N.J. H.F.A. These documents were recently revealed to me and were marked as Government's exhibit 11501 for the trial of James M. Canino.

3. My review of the documents indicates to me that they were prepared during an audit between April 20,

1976 and May 3, 1976. This is determined from the dates indicated on the work papers as well as cross-referencing dates of requisitions appearing in the documentation.

4. From my review of the work papers of Mr. Hutcheson, it is my opinion as an accountant that Mr. Hutcheson was aware of the existence of Regional Funding since reference to Regional Funding is made on numerous occasions in his work papers and that he was further aware that Regional was a related party to A. J. Tenwood Associates and to Parkview Towers. This opinion is made from review of documents entitled "A. J. Tenwood Associates, Inc. Cash Disbursements and Cash Receipts", (Exhibit A annexed hereto). On this document there are three columns. The first for Parkview Towers, the second for Excell Properties Corp. and the third for Regional. Reference to the second cash disbursements page (Exhibit B annexed hereto) indicates loans to Alvin Raphael and James Canino. Although there were only a small amount of transactions listed, Mr. Hutcheson deemed it proper to provide a separate column for Regional Funding. In my experience as an accountant, this leads me to believe that the column was set up for Regional because it was a related entity and of some relative importance.

5. I should further note that a separate reconciliation regarding the Regional account was made by Mr. Hutcheson. My review of the entities and individuals for which separate reconciliations were performed further supports my conclusion that Mr. Hutcheson was aware of the status of Regional as a related party since such reconciliations were done only for entities and individuals to whom and from whom funds were controlled by Canino and Raphael. These were, in fact, related parties. Other entities for which reconciliations were not done were

not owned by Canino or Raphael and for which they had only limited control over funds.

/s/ Hyman Wolborsky
HYMAN WOLBORSKY

Sworn to and subscribed
before me this 11
day of January, 1982

/s/ Susan Ranski
SUSAN RANSKI
Notary Public of New Jersey
My Commission Expires Dec. 9, 1982

JJW/sr
01/11/82
Caninoaf.script

CUMMINS, DUNN, HOROWITZ & PASHMAN
Court House Towers
39 Hudson Street
Hackensack, New Jersey 07601
(201) 489-1500

Attorneys for Defendant

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Criminal No. 80-82

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JAMES M. CANINO,
Defendant.

[Filed Jan. 13, 1982]

AFFIDAVIT OF DONALD HOROWITZ IN SUPPORT OF MOTION FOR NEW TRIAL

STATE OF NEW JERSEY)
) ss:
COUNTY OF BERGEN)

Donald Horowitz, being duly sworn according to law, upon his oath deposes and says:

1. I am an Attorney At Law of the State of New Jersey, a partner in the firm of Cummins, Dunn, Horowitz & Pashman, attorneys for defendant Canino in the captioned matter, and am personally responsible for the handling of this matter for the firm.

2. I have represented Alvin Raphael and James M. Canino and various corporate entities in which they either had an interest and/or served as officers and/or em-

ployees, since the commencement of the joint federal/state investigation in January 1979. Upon the return of the captioned indictment in March 1980, I became, with leave of Court, the attorney of record for defendant Alvin Raphael, and another lawyer became attorney of record for defendant James M. Canino. Upon Mr. Raphael's death I, again with leave of Court, became the attorney of record for Mr. Canino.

3. I was fully involved in the pre-trial proceedings, including discovery, on behalf of Messrs. Raphael and Canino, and was the trial attorney for Mr. Canino.

4. I have reviewed the documents annexed to the Affidavit of Seymour Margulies, Esq., which documents appear to be copies of workpapers of a New Jersey housing finance agency auditor, a Mr. J. W. Hutcheson.

5. At no time during the pre-trial proceedings or during the trial itself did I ever see these documents nor were the contents of them made known to me by the United States Attorney, his Assistants, or the various Investigative Agents assigned to the matter. The first time I saw these documents and their existence made known to me was on December 31, 1981 at which time these documents, or copies thereof, was presented to me for review by Mr. Margulies.

/s/ Donald Horowitz
DONALD HOROWITZ

Sworn to and subscribed
before me this 11th day
of January 1982.

/s/ Alice O. Boas
ALICE O. BOAS
Notary Public of New Jersey
My Commission Expires July 1, 1984

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

HON. H. CURTIS MEANOR

Docket No. 80-82

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JAMES M. CANINO,
Defendant.

[Filed Jan. 13, 1982]

Criminal Action

AFFIDAVIT

STATE OF NEW JERSEY)
) ss:
COUNTY OF HUDSON)

SEYMOUR MARGULIES, being duly sworn according to law, upon his oath deposes and says:

1. I am an Attorney at Law of the State of New Jersey and am presently representing the defendant, James M. Canino in criminal proceedings pending in the United States Court of Appeals for the Third Circuit as well as before this Court.

2. Because of this representation I am also collaterally involved with Mr. Canino in certain civil litigation now ongoing in which Mr. Canino and the government are parties. In such capacity I had occasion to be present in the office of the United States Attorney for discovery proceedings in the civil matter on or about December 14,

1981. I appeared with Mr. Stern of Mr. Kaps' office. They represent Canino in the civil suit.

3. During such discovery proceedings, I requested three documents. I asked to examine the original of the requisition file, copies of which I had seen but the original of which I had not seen. I asked for the final cost certification copy of which I had seen but the original of which I had not seen. In connection with the cost certification I also specifically asked for any H.F.A. audit. I had access to the exhibit list and was told that the audit had a particular exhibit number. I asked for it by number.

4. I since learned that there are three exhibit numbers dealing with the audit. I went through some of the exhibits with Mr. Canino's accountant. I asked him questions about the requisition, about the cost certification and generally about the audit. The conversations were extremely brief. I asked the accountant to go through the audit since he would know better from his accounting background what was in it than I would and I wanted him to let me know if there were any references in the audit that indicated the existence of Regional.

5. I asked the fellow who was making copies to make me a copy of excerpts from the audit consisting of the instructions to the auditor and I took them with me when I left. I learned from Mr. Canino shortly thereafter that his accountant indeed had found references to Regional and I asked that I be supplied with a copy of the whole audit file.

6. I subsequently asked the accountant to check the other two exhibit numbers which identify the H.F.A. audit and was told that the other exhibit numbers contained no reference to Regional.

7. When I was given exhibit 11501 in the U.S. Attorney's office, I was informed that this exhibit number was

given to the document by the U.S. Attorney in preparation for the criminal trial of Mr. Canino.

8. A review of the documents indicates, on those pages which I have taken the liberty of marking, clear reference to Regional Funding.

/s/ Seymour Margulies
SEYMOUR MARGULIES

Sworn to and subscribed
before me this ———
day of February 1981

/s/ Susan Ranski
SUSAN RANSKI
Notary Public of New Jersey
My Commission Expires Dec. 9, 1982

JJW/sr
12/31/81
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